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No. 80-1367

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LINUS J. NIEDERMEYER,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Writ of Certiorari to the Supreme Court for the State of Oregon

Petition for Certiorari -- Criminal Case

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QUESTION PRESENTED

Can a police officer make a forcible entry into a private home in order to make a misdemeanor arrest without a warrant, without hot pursuit, and without identifying himself after he has hailed a suspect in front of the home and the suspect retreats inside?

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LINUS J. NIEDERMEYER,

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STATE OF OREGON,

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Petition for Certiorari -- Criminal Case

OPINION BELOW

The order of the Oregon State Supreme Court denying this petitioner's petition for review (Appendix, infra, p. 11) is reported in ___Or___, ___P2d___(1980). The opinion of the Oregon State Court of Appeals (Appendix, infra, p.p.2-10) is reported in 48 Or App 665, 617 P2d 911 (1980).

JURISDICTION

The order of the Oregon State Supreme Court denying review (Appendix, infra, p.11), was entered on December 16, 1980. Re-hearing was not sought. The jurisdiction

of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fourth Amendment, United States Constitution, which provides:

> "SECURITY FROM UNREASONABLE SEARCHES AND SEIZURES. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing a place to be searched, and the persons or things to be seized.

2. The statute under which petitioner was prosecuted, though nothing turns on its terms, is ORS 487.555, which provides as follows:

> "487.555 FLEEING OR ATTEMPTING TO ELUDE A POLICE OFFICER. (1) A driver of a motor vehicle commits the crime of fleeing or attempting to elude a police officer if, when given visual or audible signal to bring the vehicle to a stop, he knowingly flees or attempts to elude a pursuing police officer.
>
> "(2) The signal given by the police officer may be by hand, voice, emergency light or siren.

"(3) As used in this section, 'police officer' means a sheriff, municipal policeman or member of the Oregon State Police in uniform, prominently displaying his badge of office, or who is operating a vehicle appropriately marked showing it to be an official police vehicle.

"(4) Fleeing or attempting to elude a police officer is a Class A misdemeanor."

3. The statute which defines attempt to elude as a major traffic offense, though nothing turns on its terms, is ORS 487.530(4), which provides as follows:

"487.530 DEFINITIONS FOR ORS 487.530(2) 487.560. As used in chapter 451 Oregon Laws 1975, unless the context requires otherwise, 'major traffic offenses' includes:

"****

"(4) Fleeing or attempting to elude a police officer as set forth in ORS 487.555."

4. The statute that defines "major traffic offense", though nothing turns on its terms, is ORS 484.010(5)(e), which provides as follows:

"484.010 DEFINITIONS FOR ORS 484.010-484.435. As used in ORS 1.510, 1.520 and 484.010-484.435, unless the context otherwise

requires:

"*****

"(5) 'Major traffic offense' means a violation of any of the following provisions of law or a city ordinance conforming thereto:

"*****

"(e) Fleeing or attempting to elude a police officer, as defined in ORS 487.555."

4. The statute under which petitioner was arrested is ORS 484.100(1), which provides as follows:

"484.100 AUTHORITY OF POLICE OFFICER TO ARREST OR ISSUE CITATION. (1) A police officer may arrest or issue a citation to a person for a traffic offense at any place within the jurisdictional authority of the governmental unit by which he is authorized to act."

5. The statute under which petitioner was arrested is ORS 133.235(5), which provides as follows:

"133.235 ARREST BY A PEACE OFFICER; WHEN AND HOW MADE.

"*****

"(5) In order to make an arrest, a peace officer may enter premises in which he has probable cause to believe the person to be arrested to be present."

STATEMENT OF THE CASE

Oregon State Police officers Boatwright and Richey observed a red Audi northbound on I-5 approaching the City of Portland, Oregon (Tape CT A46, 401B at 360).[1]

The car exited Interstate 5 and was stopped by the State Police in order to issue a traffic citation for speeding. (Tape CT A46, 401B at 371). In stopping the vehicle, the state officers had turned on their overhead lights (Tape CT A46, 401B at 371-377). The driver then eluded the State Police (Tape CT A46, 401B at 383-389, 394). No identification was made of the driver (Tape CT A46, 401B at 381-383, 391).

The Lake Oswego Police were subsequently notified by radio of the description of the car, together with a Lake Oswego address of the registered owner (Tape CT A46, 401A at 273-289). The Lake Oswego Police were also informed that there were two suspects in the red Audi (Tape CT A46, 386B at 374-381).

The Lake Oswego Police were dispatched to the address of the registered owner, where

they waited one hour until the suspect car appeared. (Tape CT A46, 401B at 404-407).

At 4:08 a.m., officer Reed of the Lake Oswego Police followed the Audi up the driveway and into the garage where he saw the driver get out of the car and into a lit garage; he saw no other occupants of the car (Tape CT A46, 401A at 331, 337, 365). The officer could not recall if his overhead lights were on (Tape CT A46, 401A at 361). At this time it was dark (Tape CT A46, 401A at 387), and officer Reed was standing outside of the lit garage (Tape CT A46, 401A at 367). Officer Reed only told the driver to "stop"; he never identified himself (Tape CT A46, 401A at 383-385). There is no evidence on the record that the driver knew he was being hailed by a police officer (Tape CT A46, 401A at 363-385).

When the arresting officers first saw defendant, they were standing in the doorway and the defendant was inside, clad in his underwear (Tape CT A46, 386B at 8). The officers entered the dwelling and secured

defendant (Tape CT A46, 401B at 28-30). The officers did not enter the home to make an arrest, but to conduct an investigation and hold a suspect until identification could be made by the State Police (Tape CT A46, 386B at 208-214).

After securing defendant, the police proceeded upstairs, searched a bedroom (Tape CT A46, 386A at 42-49), and forced open a door that had been locked from the inside (Tape CT A46, 386B at 58-60).

At trial, defendant filed the following "Motion to Suppress and Dismiss":

> "Comes now defendant by and through his attorney, William V. Bierek, and moves this court for an Order suppressing the issuance of a citation issued in the above captioned case on the grounds and for the reason that the issuance of said citation was as a direct result of an illegal and unconstitutional search and arrest of the defendant at his residence without a warrant for either, nor was such search and arrest based upon probable cause."

The trial court held that

> "absent exigent circumstances, a warrant must be obtained by an officer before he enters a person's home, and I do not find

any exigent circumstances in the facts of this case to justify this type of entry. So it is unconstitutional and illegal, and the citation will be dismissed and the fruits of the search will be suppressed." (Tape CT A46, 401B at 469-479); App., p. 16)

On appeal, the State made the following assignments of error in its brief:

"Assignment of Error No. 1. The trial court erred in ordering dismissal of the citation in this case on the ground its issuance was the fruit of an illegal search and seizure;

"Assignment of Eror No. 2. The trial court erred in ordering that all evidenciary fruits of a search be suppressed."

Defendant, in his brief, presented the following question on appeal:

"2. Did the State fail to carry its burden of proof that the warrantless entry into defendant's house was justified by hot pursuit?"

The Court of Appeals held:

"When defendant did not heed officer Reed's call to stop and instead ran into his house, the police acted lawfully when they followed him through an open door. State v. Wesson, 40 Or App 99, 591 P2d 755 (1979); United States v. Santana, 427 US 38, 96 S.Ct. 2406, 49 L. Ed. 2d 300 (1976).

> "The most reasonable conclusion to be drawn from the facts is that 'hot pursuit' justified the warrantless entry into defendant's home by Oswego Police." State v. Niedermeyer, 48 Or App 665, 670, 617 P2d 911, 913 (1980).

In defendant's petition for review, defendant relied, inter alia, upon the following point for reversal:

> "2. The Court of Appeals erred in finding that the arresting officers were engaged in hot pursuit when they made a warrantless entry into defendant's house."

On December 16, 1980, the Oregon Supreme Court denied review, and defendant now petitions this court for certiorari.

ARGUMENT

A. Conflict with Applicable Decisions of this Court. This Court has stated that merely attempting an arrest in a public place does not, in itself, provide an exigent circumstance so as to justify a warrantless entry into a house. Vale v. Louisiana, 399 U.S. 30, 35, 90 S. Ct. 1969, 1972, 20 L. Ed. 2d 409 (1970). Even where officers have commenced an arrest in public, whether or not

they can enter the suspect's house is subject to the limitation that speed must be essential. United States v. Santana, 427 U.S. 38, 42, 96 S. Ct. 2406, 2409, 49 L. Ed.2d 300 (1976)(realistic expectation that evidence may be destroyed); Warden v. Hayden, 387 U.S. 294, 298-299, 87 S. Ct. 1642, 1646, 18 L. Ed.2d 782 (1967)(delay would gravely endanger officers' lives or the lives of others. Cited in Santana); Vale v. Louisiana, supra, 399 U.S. at 33-34, 90 S. Ct. at 1971 (arrest outside suspect's house did not permit arresting officers to conduct search inside suspect's house).

The Oregon Court of Appeals held that the Oswego Police had probable cause to believe the driver of the Audi had violated ORS 487.555 (attempt to elude a police officer). The court went on to hold that when the driver failed to heed officer Reed's call to stop, the officer could then follow the suspect into the house.

This fact situation differs from those facts presented in Warden v. Hayden and

United States v. Santana in some important respects. In this case there is no evidence on the record that the suspect had any knowledge that he was being hailed by a police officer. Officer Reed never identified himself and was standing outside the lit area of the garage. This was not a pursuit situation as in Santana, where the suspect retreated into her house when the police officers identified themselves and created an expectation of escape or destruction of evidence. Quite to the contrary, when the suspect here ran into the house in response to a call out of the night, the inference is that he will stay within the safety of the house and not venture out into the night. The concern about preserving evidence is also inappropriate here where the charge (attempting to elude) did not involve any tangible evidence.

Unlike Warden, there is no evidence here that the delay necessary in obtaining a warrant would endanger the lives of the officers or the lives of others. This case

involves a misdemeanor traffic offense, not armed robbery.

In both Santana and Warden, the suspect was wanted in connection with a felony. This suspect was wanted on a misdemeanor.

In United States v. Watson, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed.2d 598 (1976), this Court affirmed the common law rule generally authorizing felony arrests in public on probable cause without a warrant. 423 U.S. at 421, 424, 96 S. Ct. at 827, 828. The rule has not beenso liberal, however, with respect to misdemeanor arrests. §120.1 of the Model Code of Pre-arraignment Procedure was adopted by the American Law Institute as the traditional and almost universal standard for arrest without a warrant. Watson, supra, 423 U.S. at 422, 96 S. Ct. at 827. §120.1 reads in pertinent part as follows:

> "(1) Authority to Arrest Without a Warrant. A law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed

"*****

"(b) a misdemeanor and the officer has reasonable cause to believe that such person

"(i) will not be apprehended unless immediately arrested;

"(ii) may cause injury to himself or others or damage property unless immediately arrested; or

"(c) a misdemeanor or petty misdemeanor in the officers' presence."

Where the officer, as here, had no reason to believe the suspect would avoid apprehension by police, or would create a danger to himself or others, and when the alleged crime did not take place within the presence of the officer, under the rule adopted by the American Law Institute, officer Reed could not even have made a public arrest of the suspect.

In holding as they did, the Oregon Supreme Court and Court of Appeals apparently read only that part of Santana that reads as follows:

"The only remaining question is whether [Santana's] act of retreating into her house could thwart an otherwise proper arrest.

We hold that it could not." 427 U.S. at 42, 96 S. Ct. at 2409.

But the opinion reads on:

"This case, involving a true 'hot pursuit,' is clearly governed by Warden; the need to act quickly here is even greater***." 427 U.S. at 42-43, 96 S. Ct. 2409-2410.

This Court has recognized that arrests in the home involve an invasion of the sanctity of the home so substantial that in the absence of exigent circumstances, the arrest will not be permitted without a warrant. Payton v. New York, ___U.S.___, 100 S. Ct. 1371, 1381, 63 L. Ed.2d 639 (1980). No such circumstances have been shown to exist in this case.

The reasoning by the lower court permits a warrantless entry merely if a suspect retreats into his house when an officer attempts to make a stop and when the officer had probable cause to make a public arrest. Absent a showing of exigent circumstances, this ruling allows a warrantless entry upon probable cause alone. This is not the thrust of Santana, and it is directly contrary to

this Court's holding, in Payton v. New York, supra.

It should also be noted that officer Reed's purpose for making a warrantless entry was only to further an investigation on the elude charge. This type of police procedure was expressly condemned by this Court in Brown v. Illinois, 422 U.S. 590, 605, 95 S. Ct. 2254, 2262, 45 L. Ed.2d 416 (1975).

B. Conflict with the Decisions of Other State Courts of Last Resort and Federal Courts of Appeal. The Federal Circuits that have considered a warrantless police entry into a home since Santana agree that exigent circumstances must exist in order for the entry to survive a constitutional challenge under the Fourth and Fourteenth Amendments of the United States Constitution. United States v. Edwards, 602 F2d 458, 468 (C.A. 1st 1979)(possibility that evidence would be destroyed by suspects who had discovered government surveillance); United States v. Houle, 603 F2d 1297, 1300 (C.A. 8th, 1979)(entry violated the Fourth

Amendment where police had no fear of an attempted escape or that evidence would be destroyed); United States v. Williams, 612 F2d 735, 739 (C.A. 3rd 1980)(legitimate concern that immediate police action was necessary in order to prevent an escape and danger to the lives of the suspect, the police officers and others).

The state courts of last resort that have applied Santana, also agree that retreat into a house is not, of itself, an exigent circumstance so as to justify a forcible entry into a home to make an arrest. State v. Love, 123 Ariz. 157, 598 P2d 976, 978 (1979)(a fleeing felon is an exigent circumstance justifying a warrantless entry); State v. Allison, 298 N.C. 135 257 S.E.2d 417, 421 (1979)(adopts the test used in Dorman v. United States, 140 U.S. App. D. C. 313, 319-320, 435 F2d 385, 392-393 (1970)[2]).

State v. Love, supra, presents a fact situation similar to Santana and the present case. Love is similar to both cases in that

the police attempted to arrest a suspect in the doorway of his house. The suspect retreated into the house and the police followed him and arrested him inside. Love looses its similarity with this case, but remains similar to Santana in that the suspect was wanted in connection with a felony, the officers identified themselves as police, the police officers had strong reason to believe that the suspect had committed the crime involved, and entry was made during the day.

In Love, the Arizona Supreme Court held that a warrantless entry into a dwelling to effect an arrest is per se unreasonable unless exigent circumstances require the police to act before a warrant can be obtained. 598 P2d at 970. The circumstances justifying police entry in that case where that the suspect was wanted in connection with a felony and was in the act of fleeing from the police. Id. The holding in this case is devoid of any such rational. State v. Niedermeyer, 48 Or App at 670, 617 P2d at

913.

Here, officer Reed never identified himself and was not in a lit area where he could assume the suspect could perceive his identity. Unlike Love and Santana, there is no basis on this record for the police to assume that the suspect was fleeing arrest.

This suspect was wanted in connection with a misdemeanor. It was not a grave offense and there is no evidence that the suspect posed any danger to anyone.

Officer Reed did not have a clear showing of probable cause that this suspect committed the crime involved. In Santana, the police arrested a suspect minutes after she had purchased heroin. That suspect said she had purchased it from Santana. In Love, the arresting officers had observed approximately 1,000 pounds of marijuana in the suspect's possession shortly before the arrest. Here, the arresting officer only had the description of a suspect automobile which had been out of police observation for an hour, and the vehicle's occupancy had

apparently changed from two to one occupant.

In addition, the entry was made at approximately 4:30 a.m. after the police had the opportunity to observe defendant inside the house in his underwear. Entry under these circumstances was not reasonable, and was, therefore, in violation of defendant's rights, as protected under the Fourth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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FOOTNOTES

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[1] See Appendix pp. 13-16 for trial court's findings of fact and conclusions of law.

[2] "[It may be useful to refer to a number of considerations that are material, and have particular pertinence [in cases of warrantless entries].

"First, that a grave offense is involved particularly one that is a crime with violence. ****

"Second, and obviously inter-related, that the suspect is reasonably believed to be armed.****

"Third, that there exists not merely the minimum probable cause *** but beyond that a clear showing of probable cause *** to believe that the suspect committed the crime involved.

"Fourth, strong reason to believe that the suspect is in the premises being entered.

"Fifth, a liklihood that the suspect will escape if not swiftly apprehended.

"Sixth, the circumstance that the entry, though not consented, is made peaceably. ****

"Another factor to be taken into account *** relates to the time of entry." Dorman v. United States, 140 U.S. App D.C. 313, 319-320. 435 F2d 385, 392-393 (1970).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LINUS J. NIEDERMEYER,	)
	)
Petitioner,	)
	)
v.	)
	)
STATE OF OREGON,	)
	)
Respondent.	)

APPENDIX TO PETITION FOR CERTIORARI

IN THE COURT OF APPEALS

FOR THE STATE OF OREGON

STATE OF OREGON,	)	
	)	
Petitioner,	)	No. J 8225
	)	
v.	)	CA 17574
	)	
LINUS J. NIEDERMEYER,	)	
	)	
Respondent.	)	

****

Appeal from District Court, Multnomah County

Aaron Brown, Jr., Judge.

Argued and submitted August 22, 1980.

James M. Mountain, Jr., Assistant Attorney General, Salem, argued the cause for appellant. With him on the brief were James M. Brown, Attorney General, and Walter L. Barrie, Solicitor General, Salem.

William V. Bierek, Portland, argued the cause for respondent. With him on the brief was Dana R. Taylor, Portland.

Before Richardson, Presiding Judge, and Thornton and Buttler, Judges.

THORNTON, J.

Reversed and remanded for trial.

FILED: October 13, 1980

THORNTON, J.

Defendant was charged by Uniform Traffic Citation Complaint with fleeing or attempting to elude a police officer. ORS 487.555[1]

The trial court, on pre-trial motion of defendant, dismissed the citation on the ground that the arrest was the fruit of an illegal search and seizure. The state appeals, assigning as error the following pre-trial orders of the trial court:

1) Ordering dismissal of the citation, and

2) Ordering that all evidentiary fruits of the search be suppressed.

The facts which led up to the filing of this charge against defendant are somewhat complicated.

On March 4, 1979, Oregon State Policemen Boatwright and Richey were patrolling Interstate Highway I-5 in a marked car. At 2:54 a.m., they saw a red Audi Fox automobile, Oregon License No. EKR 090, enter I-5 at the Terwilliger on-ramp at a high rate of speed. The officers followed the Audi as it traveled I-5 and I-405 at speeds up to 78

miles per hour in a 50 mph zone.

The police turned on the overhead lights of their car and signalled the driver of the Audi to stop. The driver did not stop immediately. He slowed his vehicle, took the Highway 30 exit at the end of the Fremont Bridge, drove on Vaughn Street, turned at N.W. 21st Avenue, and pulled into a parking space. After parking his vehicle behind the Audi, Trooper Boatwright approached the car while shining his flashlight on the face of the driver, who had opened the driver's side door.

The Audi driver, whom Boatwright later identified as defendant, closed his car door as the officers approached, and he sped off. The officers attempted to follow the defendant's car, but they were unable to catch up to it. They called in a report of the incident, a description of the driver, and the Audi's license number to their dispatcher.

At 3:05 a.m., Lake Oswego Police Officer Reed was advised by his dispatcher that a red

Audi had eluded the Oregon State Police in Portland and had been involved in a shooting in Washington Park. Reed was told the car was registered to someone named Niedermeyer who resided in Lake Oswego at 2801 South Shore Boulevard, and that two suspects were involved. Accompanied by Officer Grant in a second car, Officer Reed immediately went to defendant's address, which he staked out when it appeared no one was home.

At 4:08 a.m, about an hour after Reed and Grant began their watch of defendant's house, they saw a red Audi being driven on South Shore, onto defendant's driveway and into the garage. Reed pulled his vehicle into the driveway. He saw defendant jump out of his car. No passenger was observed in the vehicle. The officer called for defendant to stop, but he ran into the house. Reed stopped in the dark, opened doorway to wait for cover from Officer Grant.

Approximately two minutes later, defendant came down a stairway in his undershorts and asked what was going on.

Defendant was told to lie down on the floor. After a third officer arrived to take charge of defendant, Officers Reed and Grant went through the house looking for other people and a weapon. In an upstairs bedroom they saw defendant's clothing and car keys in open view. The officers found no weapon when they looked through dresser drawers. They forced open the door to one bedroom which was apparently bolted from the inside, but found no one. However, in another bedroom, Reed and Grant found Scott Niedermeyer, defendant's brother.

After the defendant was advised of his rights, he refused to answer questions about his driving or any firearm. Officer Reed forcibly seated the defendant when he raised a fist at the officer. Defendant's brother Scott said a blank pistol had been used but a friend had possession of the gun. In the back seat area of defendant's car, Officers Grant and Reed saw an empty .22 caliber shell box and shell casings.

At 4:34 a.m., State Troopers Boatwright

and Richey arrived at defendant's home to which they had been dispatched. After Officer Boatwright identified the Audi as the car which had eluded him, and the defendant as the driver of the car, he issued the defendant a citation for attempting to elude. The defendant was not taken into custody.

Prior to his trial on the attempting to elude charge, the defendant filed a motion to "suppress" the issuance of the citation on the ground issuance was the result of an illegal and unconstitutional search and arrest of defendant. In the motion he also asked for dismissal.

The trial court found the facts to be the same in all particulars set forth above.

As to the first question, whether the district court had authority to dismiss the citation, we conclude that it did not.

As we understand the dismissal order, the basis of the court's action was its conclusion that the issuance of the citation was the fruit of an illegal arrest.

First, we conclude that the arrest and

citation of defendant was lawful. The state police officers had probable cause to believe that the driver of the red Audi had violated ORS 487.555, a Class A misdemeanor and a major traffic offense. ORS 487.555(2), 487.530(4), 484.010(5)(e). Other officers, including the Oswego police, receiving the broadcast information of the alleged eluding incident, had the same probable cause. The Oswego officers, in addition, had received word that the same Audi had been involved in a shooting incident in Washington Park. When the lake Oswego officer saw defendant pull into his driveway, they were authorized to arrest him. ORS 484.100(1). When defendant did not heed Officer Reed's call to stop and instead ran into his house, the police acted lawfully when they followed him through an open door. State v. Wesson, 40 Or App 99, 591 P2d 755 (1979); United States v. Santana, 427 US 38, 96 S. Ct. 2406, 49 L. Ed.2d 300 (1976).

The most reasonable conclusion to be drawn from the facts is that "hot pursuit"

justified the warrantless entry into defendant's home by Oswego police. The city officers were authorized to enter and detain defendant for identification and citation by state police officers, who, it was reasonable to believe, had been eluded by defendant. It follows, therefore, that the actions of the Oswego officers were proper and did not afford a basis for dismissing the citation.

Second, once defendant was apprehended and arrested at his home on the eluding charge (ORS 487.555), what transpired inside the home thereafter was irrelevant to this case. This includes the searching for the weapon reported to be involved in the Washington Park episode as well as the breaking down of the bedroom door. It was therefore error of the trial court to consider these actions as a basis for decision, if in fact it did so.

Lastly, we do not find this to be an appropriate case for the application of the permissive dismissal rule mentioned in State v. Scurlock, 35 Or App 579, 581-82, 581 P2d

986, aff'd as modified, 286 Or 277, 593 P2d 1159 (1979).

Reversed and remanded for trial.

FOOTNOTE

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[1]"(1) A driver of a motor vehicle commits the crime of fleeing or attempting to elude a police officer if, when given visual or audible signal to bring the vehicle to a stop, he knowingly flees or attempts to elude a pursuing police officer.

"(2) The signal given by the police officer may be by hand, voice, emergency light or siren.

"(3) As used in this section, 'police officer' means a sheriff, municipal policeman or member of the Oregon State Police in uniform, prominently displaying his badge of office or who is operating a vehicle appropriately marked showing it to be an official police vehicle.

"(4) Fleeing or attempting to elude a police officer is a Class A misdemeanor." ORS 487.555

December 17, 1980

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RE: State v. Linus J. Niedermeyer
CA 17574 SC 27450

Dear Mr. Bierek:

The Supreme Court on December 16, 1980, denied Respondent's Petition for Review in the above-entitled matter.

This letter constitutes the order of the Supreme Court denying the petition.

Very truly yours,

/s/ Marilyn Hartley

Marilyn Hartley
Supreme Court Calendar Clerk

MH/vr
cc: James M. Mountain, Jr.

STATE OF OREGON
COURT OF APPEALS

LINUS J. NIEDERMEYER,	)	JUDGMENT AND MANDATE
	)	
Petitioner,	)	Appeal from
	)	MULTNOMAH County
v.	)	District Court
	)	
STATE OF OREGON,	)	No. J 8225
	)	CA 17574
Respondent.	)	

This cause having come on to be heard on appeal and having been duly submitted and considered, and petition for review having been denied by the Supreme Court on December 16, 1980:

IT IS HEREBY ADJUDGED AND ORDERED that the decision entered below in this cause is reversed and remanded for trial.

The cause is returned below for further proceedings pursuant to law and the opinion and order of the court entered October 13, 1980.

IT IS FURTHER ORDERED that appellant recover from respondent costs and disbursements in this court taxed at $75.00.

ISSUED at Salem, Oregon: January 7, 1981.

IN THE DISTRICT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,	)	
	)	
Plaintiff,	)	No. J8225
	)	
v.	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
LINUS J. NIEDERMEYER,	)	(Tape CT A46, 401B
	)	at 360-500)
Defendant.	)	

Court: "Here is my ruling, I better just make some concise facts, alright?"

District Attorney: "Okay."

Court: "Alright, this is one you can rely upon.

"Fact number one: Defendant was first seen on I-5 headed North. He took the St. Helens Highway 30 exit and went down to Vaughn Street, made a left turn onto Vaughn and switched three lanes into the right hand lane; whereas, he made a right turn on N.W. 21st, and was stopped by the officer.

"The second fact is that the officer did put his headlights on, his top lights around the circles, at Couch Street overpass and kept them on until he got behind the defendant on 21st.

"Thirdly, the court finds that the defendant did in fact --- I won't say defendant because we are not definite about identification, and since we're not having a trial, I would put this on fact three that the driver of the car did in fact elude the police officers by going down one block, turning left, going down another block, made another left turn, and then shooting down the highway. By the time the officers could get there he was at least six blocks down the street. And in fact he did, the alleged driver, did in fact get the car over to Niedermeyer's residence. Now I don't know who was driving, I won't say that now. But I will say that the alleged driver did elude and did leave the scene and go to Niedermeyers' residence where the ---

"And the fourth fact will be that the officer Reed received information that this car had been involved in an alleged shooting in Washington Park, and that the driver had eluded the officers.

"Fifthly, we find that the officers

waited one hour until the car appeared at the residence of the Niedermeyers.

"Sixth, that defendant ran into his home, and the officer appeared in the doorway with his revolver drawn, chasing the defendant, the defendant driver, because we still don't know who was driving the car. The defendant driver.

"Then seventh, that officer Reed and Grant entered the Niedermeyer home without the consent of the owner, or hot pursuit. In other words, I am trying to say the facts indicate there is no hot pursuit here.

"And eighthly, that this entry was illegal due to the fact that it was made without a warrant for the defendant's arrest.

"Now, the legal conclusion is this: is that the ORS 133.235 which provides that

> 'in order to make an arrest, a peace officer may enter premises in which he has probable cause to believe the person to be arrested to be present.'

"Now, the question I have decided is whether this is constitutional as applied to

the facts of this case. Based upon Article I, §9 of the Constitution of the State of Oregon, and the Fourth Amendment. And the conclusion is that absent --- in other words what I am trying to say is that absent exigent circumstances a warrant must be obtained by an officer before he enters a person's home, and I don't find any exigent circumstances in the facts of this case to justify this type of entry. So it's unconstitutional and illegal and the citation will be dismissed and all of the fruits of the search will be suppressed. That is based on State v. Olsen, 287 Or 157, and State v. Peller, 287 Or 255, all 1979 cases, which indicate that the -- I have the case right here. In State v. Olsen, the judge says

> 'the following cases are ones which not only state the rule that a warrant is necessary in the absence of exigent circumstances, but have also quashed the evidentiary fruits of the entry made for the purpose of the arrest.'"

ALEXANDER L. STEVAS
CLERK

No. 80-1367

In the Supreme Court of the United States

OCTOBER TERM, 1980

LINUS J. NIEDERMEYER,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Oregon

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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03-81

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In the Supreme Court of the United States

Case No. 80-1367

OCTOBER TERM, 1980

LINUS J. NIEDERMEYER,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Oregon

---

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of Oregon, respectfully prays that this Court deny petitioner Niedermeyer's Petition for Writ of Certiorari which seeks review of the decision of the Oregon Court of Appeals in *State v. Niedermeyer,* 48 Or. App. 665, 617 P2d 911, S. Ct. *rev denied,* 290 Or. 249 (1980).

QUESTION PRESENTED

Respondent submits that the question presented by this case is more accurately stated as follows:

Whether the Oregon Court of Appeals properly concluded that the State of Oregon had not violated the petitioner's rights under the Fourth and Four-

teenth Amendments to the United States Constitution when police officers, who had probable cause to believe that the petitioner had committed a vehicular crime within the previous 75 minutes and who had taken up surveillance of the petitioner's home, made a warrantless entry into the petitioner's house through an open door and a warrantless arrest of the petitioner, immediately after he had arrived at home in his car, failed to heed an officer's call to stop, and run from his car and into his house?

STATEMENT OF THE CASE

Respondent submits that the petitioner's summary of the facts under his statement of the case is inaccurate and incomplete. The facts were correctly summarized by the Oregon Court of Appeals. That summary appears in the Appendix to the Petition at App-3-7.

The petitioner's summary of the facts is incorrect when it states: "No identification was made of the driver" and "there is no evidence on the record that the defendant knew he was being hailed by a police officer". (Pet. 5, 6). The Court of Appeals' summary of the facts correctly recites that the state police officer who had initially attempted to conduct a traffic stop of the petitioner's vehicle, had shined his flashlight on the petitioner's face before the petitioner sped off and had called in a report of the incident, a description of the

driver, and the license number of the petitioner's vehicle. (Pet. App. 4). After the petitioner's arrest at his home by municipal police officers, the eluded state patrolman identified the petitioner's car as the vehicle which had eluded him and the petitioner as the driver of the car. (Pet. App. 6-7). The record in this case also indicates that the municipal officer who arrested the petitioner was in uniform and had approached the petitioner's house in a marked police vehicle before he hailed the petitioner to stop as the petitioner ran from his car into his house. (Tape CT A46,401 2A, Cue No. 11 at 305.

RESPONSE TO PETITIONER'S ARGUMENT IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI

The Oregon Court of Appeals concluded that the arresting officers' warrantless entry into the petitioner's home and warrantless seizure of the petitioner were constitutionally justified by the exigent circumstance of "hot pursuit". (Pet. App. 8-9). The Oregon appellate court's resolution of this issue is not in conflict with applicable decisions of this Court or the decisions of other state appellate courts and the federal courts of appeal.

A. *The Oregon Court of Appeals Decision is Consistent With This Court's Interpretations of the Fourth and Fourteenth Amendments.*

In this case, the car driven by a man eventually

identified as the petitioner eluded a state police patrol unit. The state police had probable cause to believe the driver of the vehicle had violated ORS 487.555, a Class A misdemeanor and a major traffic offense under Oregon law. ORS 487.555(2), 487.530(4), 484.010(5)(e) [set forth in Petition at 2-4]. The municipal officers who received a broadcasted report of the eluding incident, a description of the suspect vehicle, and its license number had probable cause to believe the driver of the vehicle had committed a major traffic offense when they set up surveillance of a residence which was linked by vehicle registration records to the suspect auto. When the municipal officers saw the petitioner drive the suspect vehicle into the driveway of his residence, within 75 minutes of the occurrence of the reported crime, they were authorized by Oregon law to arrest the petitioner without a warrant. ORS 133.310(1)(a);[1] ORS 484.100(1) [set forth in Petition at 4]. When the defendant failed to heed the municipal officer's call to stop and ran into his house, the police were authorized by ORS 133.235(5)[2] [set forth in Peti-

[1] ORS 133.310(1)(a) provides:

"(1) A peace officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed:

"(a) A felony, a Class A misdemeanor, an unclassified offense for which the maximum penalty allowed by law is equal to or greater than the maximum penalty allowed for a Class A misdemeanor, or a major traffic offense as defined in subsection (5) of ORS 484.010; . . ."

[2] ORS 133.235(5) provides:

"(5) In order to make an arrest, a police officer may enter premises in which he has probable cause to believe the person to be arrested to be present."

tion at 4], as interpreted by the Oregon Supreme Court, to enter the defendant's home to make an arrest.

Prior to trial in this case and the decision of this Court in *Payton/Riddick v. New York,* 445 U.S. 573, (1980), the Oregon Supreme Court interpreted ORS 133.235(5) as authorizing warrantless entries of residences to make probable cause arrests only in situations involving exigent circumstances. *State v. Olsen,* 287 Or. 157, 164-165, 598 P.2d 670 (1979).[3] The Oregon Supreme Court's interpretation of the requirements of the Fourth and Fourteenth Amendments, in the context of warrantless entries into residences for arrest purposes, is consistent with this Court's holding in *Payton/Riddick v. New York, supra,* that absent exigent circumstances, the police may not enter a house to make an arrest without a warrant. 445 U.S. at ——, 63 L.Ed.2d at 653. The Oregon Court of Appeals decision in this case is consistent with these decisions because the court based its constitutional conclusion upon its determination that the warrantless entry here was justified by exigent circumstances.

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[3] In *State v. Olsen, supra,* the Oregon Supreme said:

"It is our conclusion that the words of both the Oregon and United States Constitutions dictate that where exigent circumstances which militate against securing the warrants do not exist, probable cause to arrest does not justify a forced entry into the home of the suspect. Such probable cause justifies only the issuance of a warrant. For this reason the application of ORS 133.235(5) would be an unconstitutional application where there are no exigent circumstances."

Specifically, the Oregon appellate court recognized that the petitioner's case fell within the "hot pursuit" exception to the warrant requirement of the Fourth Amendment. This exception was specifically recognized and labeled by this Court in *United States v. Santana,* 427 U.S. 38 (1976). In that case, the police encountered a criminal suspect standing in her doorway when they arrived to arrest her for a narcotics offense. This Court held that the defendant could not thwart an otherwise proper warrantless arrest in a public place, *United States v. Watson,* 423 U.S. 411 (1976), by retreating into her house. Police entry into the vestibule of the home was justified by the exigent circumstance of "hot pursuit", even though the chase in that case ended almost as soon as it began. *United States v. Santana, supra,* 427 U.S. at 42-43.

The doctrine of "hot pursuit" had been developed but not labeled in *Warden v. Hayden,* 387 U.S 294 (1967). Civilian witnesses had followed an armed robber from a crime scene to a residence. Officers summoned to the house entered without a warrant, arrested the suspect, and searched rooms and compartments while looking for other persons and a gun. The entry, arrest, and search were sustained by this Court. It concluded that speed was essential to ensure that police had control of the robber and all weapons which could be used to effect an escape. *Id.* at 298-299. The

constitutional ruling by the Oregon Court of Appeals in this case is entirely consistent with the holdings of this Court in *Santana* and *Hayden.*

The petitioner attempts to distinguish his case from *Santana* and *Hayden* on the basis of its facts. He mistakenly states that there was no evidence in the record of this case that he had any knowledge that he was being hailed by a police officer. In fact, the officer who hailed the petitioner was in uniform and standing by a marked police vehicle. The petitioner points to the fact that he was wanted in connection with a misdemeanor whereas the suspects in *Santana* and *Hayden* were felons. He overlooks the fact that he was wanted for a crime, which for purposes of arrest, has been equated by the Oregon Legislature with a felony. His crime of Eluding a Police Officer is a serious offense and one which necessarily requires a prompt official response. Contrary to the petitioner's contention, the ruling of the Court of Appeals in this case does not allow a warrantless entry upon probable cause, absent exigent circumstances.

B. *The Oregon Court of Appeals' Resolution of the Constitutional Issue in This Case is Consistent With the Decisions of Other State Courts of Last Resort and Federal Courts of Appeal.*

The Oregon Court of Appeals decision in the petitioner's case is not in conflict with the federal and state court decisions he cites in his petition. The ar-

resting officers here had probable cause to believe the defendant had committed a crime of fleeing and eluding a police officer. When he ran into his home to avoid arrest on such a charge, the police had every reason to believe he would continue to attempt to elude them. Their concern that immediate action was necessary in order to prevent an escape was reasonable. The decision in this case is in line, rather than at odds, with the federal authorities cited by the petitioner.

Nor is the decision in this case inconsistent with the state court authorities cited by the petitioner. The "hot pursuit" principal recognized by the state court in this case has been applied by other state appellate courts in cases strikingly similar to the case at bar. In *State v. Penas,* 200 Neb. 387, 263 N.W.2d 835, 837 (1978), a drunk driving defendant attempted to avoid arrest by driving to his home, ignoring an officer's call to stop, and running through a side doorway to his house. The officer stood in the doorway, waited for cover, and arrested the defendant in the vestibule when he suddenly appeared on the stairs. Relying on *Santana,* the Nebraska court held the warrantless entry to arrest was justified by the exigent circumstance of "hot pursuit" of an offender who was attempting to evade contact with police.

In *People v. Escudero,* 23 Cal.3d 800, 153 Cal. Rptr. 825, 592 P.2d 312 (1979), the California Supreme

Court upheld a warrantless entry of a residence to arrest as "hot pursuit" even though, as in this case, an hour elapsed between initial siting of the defendant and his eventual arrest. That court, which had previously held that warrants were generally required in residential arrest situations, *People v. Ramey,* 16 Cal.3d 263, 127 Cal. Rptr. 629, 545 P.2d 133 (1976, concluded that it was not necessary that the defendant be kept in view at all times for the "hot pursuit" principal to apply. *Id.* 592 P.2d at 318.

The pertinent authorities from other jurisdictions would have required the result reached by the Oregon Court of Appeals in this case.

CONCLUSION

Respondent, the State of Oregon, respectfully submits that the Oregon Court of Appeals correctly decided a question of federal constitutional law in a manner consistent with the decisions of this Court and other state and federal courts. This Court has recently spoken to the issues presented in this case in *United States v. Santana, supra,* and *Payton/Riddick v. New York, supra.* This petition presents no new substantial question of federal constitutional law. Allowance of the petition would be improvident. Respondent respectfully prays that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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